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No. 90-56

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In The

Supreme Court of the United States

October Term, 1990

MARGARITA ROSA DE CUELLAR,

Petitioner,

versus

NICOLAS F. BRADY, as SECRETARY OF THE TREASURY OF THE UNITED STATES and MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE BRIEF FOR MANUFACTURERS HANOVER TRUST COMPANY

JULIAN H. KREEGER
KREEGER & KREEGER
44 West Flagler Street
Miami, Florida 33130
Telephone (305) 373-3101

CHRISTIAN D. KEEDY, P.A.
Counsel of Record, and
TIMOTHY H. CRUTCHFIELD
KELLEY DRYE & WARREN
2400 Miami Center
201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 372-2400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that the following named parties have an interest in the outcome of this litigation:

a. Honorable C. Clyde Atkins
Senior Judge Trial Judge
United States District Court for
the Southern District of Florida
301 N. Miami Avenue, Room 417
Miami, Florida 33128-7792

b. Julian H. Kreeger, Esq.
Kreeger and Kreeger
Attorneys for Manufacturers
Hanover Trust Company
44 West Flagler Street
Miami, Florida 33130

c. Christian D. Keedy, P.A.
Kelley Drye & Warren
Attorneys for Manufacturers
Hanover Trust Company
201 S. Biscayne Boulevard, Suite 2400
Miami, Florida 33131

d. Kenneth W. Starr, Solicitor General
Attorney for Nicholas F. Brady
as Secretary for the United States
Department of Treasury
U.S. Department of Justice
Washington, D.C. 20530

e. Jay S. Bybee, Esq.
U.S. Department of Justice
Appellate Staff
Department of Treasury
9th and Pennsylvania Avenue, N.W.
Room 3636
Washington, D.C. 20530

CERTIFICATE OF INTERESTED PARTIES - Continued

f. Stephen J. Murphy, III, Esq.
U.S. Department of Justice
Civil Division
Attorneys for James A. Baker, as
Secretary of the United States
Department of Treasury
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044

g. Emmanuel Perez, Esq.
Emmanuel Perez & Associates, P.A.
Attorney for Margarita Rosa De Cuellar
3191 Coral Way, Third Floor
Miami, Florida 33145

h. Manufacturers Hanover Trust Company
Defendant/Respondent
c/o Kelley Drye & Warren
201 South Biscayne Boulevard, Suite 2400
Miami, Florida 33131

i. Nicholas F. Brady, as Secretary of
the Treasury of the United States
Defendant/Respondent
9th and Pennsylvania Avenue, N.W.
Room 3636
Washington, D.C. 20530

j. Margarita Rosa De Cuellar
Plaintiff/Petitioner
c/o Emmanuel Perez & Associates, P.A.
1313 Coral Way
Miami, Florida 33145

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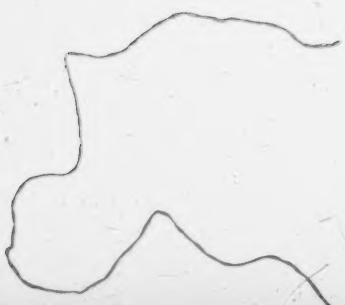

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JURISDICTION

Although this Court has discretionary jurisdiction when considering a Petition for Writ of Certiorari, this case presents none of the characteristics described by Supreme Court Rule 10.1 as reasons for granting a Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In 1937, the Republic of Cuba issued the subject "Republic of Cuba External Sinking Fund 4 1/2% bonds," with the total face value of this bond series being $85,000,000.00. These were bearer bonds negotiable by simple delivery, and they were registered securities which were traded on both the New York and Havana Stock Exchanges. Pursuant to an Indenture Agreement ("the Agreement") between Cuba and Manufacturers Trust Company, Manufacturers Trust Company was an agent charged with paying interest and redeeming these bearer bonds upon instruction from Cuba with funds periodically provided by Cuba. Respondent Manufacturers Hanover Trust Company ("MHT") is the successor in interest to Manufacturers Trust Company. Cuba made periodic payments to MHT until December 31, 1960, when Cuba defaulted on its payments. Since the time of its initial default, Cuba has failed to make any payments to MHT.

On July 8, 1963, the funds held by MHT were blocked by the United States pursuant to the Cuban Assets Control Regulations. 31 C.F.R. §§ 515.101-.901 (1989). As of that date, MHT held approximately $640,098.00 in

accounts for this Indenture. MHT's investment of these funds in the manner required by the Cuban Assets Control Regulations, 31 C.F.R. § 515.205, has increased the funds held by MHT for this Indenture to approximately $1,500,000.00. MHT is under the belief, based upon information available to it at the time of Cuba's default, that the outstanding bonds may have a face value of up to $44,059,000.00. It is impossible, however, to determine the amount of outstanding bonds now because MHT has no knowledge as to whether Cuba has independently redeemed any of these bonds.

The Petitioner claims to hold 127 of these bonds with a face value of $127,000. On May 12, 1987, Petitioner applied to the Department of Treasury's Office of Foreign Assets Control ("the Treasury") for a license to release sufficient money from the fund to redeem her bonds. This request was denied based on the determination that such a license would be illegal under the Cuban Assets Control Regulations. Petitioner then filed the underlying action against the Secretary of the Treasury and MHT seeking to compel the Treasury to issue the license and seeking a declaratory judgment that Cuba has no interest in the funds and/or that Cuba's interest is so minimal as not to disturb the policy behind the Trading With the Enemy Act. Petitioner also sought a declaratory judgment that the general license provision of 31 C.F.R. § 515.524 was directly applicable to her transaction. Petition, pp. 5-7. On cross motions for summary judgment, the trial court rejected the Treasury's interpretation of its regulations and granted Petitioner partial summary judgment stating that she was "legally entitled to her distributive share as represented by her bonds." *De Cuellar v. Baker*, 686 F.

Supp. 890, 896 (S.D. Fla. 1988). The trial court determined the remaining issues were moot and entered a final judgment for Petitioner. This was appealed to the United States Court of Appeals for the Eleventh Circuit which reversed the trial court and reaffirmed the Treasury's conclusion that the issuance of the requested license would violate the Cuban Assets Control Regulations.

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT WITH DECISIONS OF OTHER COURTS

Contrary to Petitioner's claim, the decision below is not in direct conflict with *Real v. Simon*, 510 F.2d 557 (5th Cir. 1975), and *Tagle v. Regan*, 643 F.2d 1058 (5th Cir. 1981). In fact, the opinion below is entirely consistent with the holdings in *Real* and *Tagle*. The differing outcomes result from crucial factual differences in these cases.[1]

In *Real*, the government would not release the assets of a deceased Cuban national's estate, even though all of his heirs were American citizens or lawfully admitted resident claims, because of the decedent's interest in his estate. No living person in Cuba, however, had any interest in the assets at issue. The resolution of *Real* was determined

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[1] Petitioner attempts to create a conflict by stating "the Court found that these cases *Real* and *Tagle* essentially stand for 'the broad proposition that under the act, there is no suggestion that assets passing to Americans should be restricted in any way.' " Petition, p. 21. In fact, the Court below merely stated that Petitioner cited *Tagle* and *Real* for that broad proposition. *See* Appendix to Petition, p. 89.

by the court's finding that "[t]here is no contention by the United States that the Cuban Government has any right or claim to this property, nor is there any assertion that any person in Cuba has any interest in the property." *Real*, 510 F.2d at 561. *Tagle* presented a case where one of three heirs to the estate of a deceased Cuban national was a resident of Cuba. In that case, the court concluded the United States should issue a license to unblock the American heirs' share of the estate because it could be sufficiently identified and separated from the interests of the Cuban resident. *Tagle*, 643 F.2d at 1063-64. The facts in the instant case, however, mandate a different result because the Cuban government has an interest in the blocked fund, and because it is not possible to identify and separate any interest Petitioner might have in the fund from Cuba's interests.[2]

II. THE CASE BELOW WAS PROPERLY DECIDED

Through a reverter clause in the Indenture Agreement, Cuba retains an interest in the blocked funds. This conclusion was reached by both the Eleventh Circuit and

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[2] Since these bonds were traded as securities on both the New York and Havana Stock Exchanges, it can be reasonably expected that there are Cuban nationals possessing these bonds. As the Eleventh Circuit noted, in the event the fund is unblocked, "it will be difficult, if not impossible, to determine if particular bearer bonds held by unknown claimants and presented for redemption have been transferred by Cuba or Cuban nationals to American nationals. This scenario is precisely what the regulations were designed to prevent." Appendix to Petition, p. 93 (citing Ferrera v. United States, 424 F.2d 888, 890 (S.D. Fla. 1976); *Tagle*, 643 F.2d at 1068).

by the United States District Court for the Southern District of New York, the only other court known to have decided the issue of Cuba's interest in this specific fund. *Lary v. Republic of Cuba*, 643 F. Supp. 194, 196 (S.D.N.Y. 1986). Furthermore, in an analogous case, it was held that the Treasury did not abuse its discretion by denying an application for a license to release funds from a trust in which Iran had a residual interest, even if "[t]he 'interest' of Iran in the funds held in the subject trust account may be contingent or *de minimus*." *Behring Int'l., Inc. v. Miller*, 504 F. Supp. 552, 557 (D.N.J. 1980). The Treasury's interpretation of its own regulations is entitled to deference and is controlling unless it is plainly erroneous or inconsistent with the purposes of the regulation. *See United States v. Larionoff*, 431 U.S. 864, 872-73 (1977). As illustrated in the appellate decision below, the Treasury's interpretation of its regulations in this case is completely consistent with the purpose of the regulations. Appendix to Petition, pp. 99-107.

The Eleventh Circuit properly disregarded Petitioner's contention that she is entitled to a license under Section 515.524 of the Cuban Assets Control Regulations. There is a significant difference between the type of private trust envisioned by that regulation and a trust indenture such as the one established with MHT. As stated by the Court below "while a trustee holds equitably title to the trust corpus, 'the debenture indenture trustee does not hold title to, or have possession of, any property.' " Appendix to Petition, p. 95 (quoting *Broad v. Rockwell Int'l., Corp.*, 642 F.2d 929, 941-42 n.18 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981)). Furthermore, to interpret Section 515.524 otherwise would contradict the plain

meaning of Section 515.512 by permitting a transfer of securities specifically prohibited by Section 515.514 merely because Cuba happened to secure the bonds with a trust. *See* Appendix to Petition, pp. 98-99.

Ultimately, the relief requested by Petitioner is, as a practical matter, impossible. There is probably no question that the fund now contains only a small fraction of the amount that would be necessary to redeem all outstanding bonds. Paragraph 21 of the Agreement specifically states that in such a situation the assets should be distributed on a pro rata basis. Appendix to Petition, p. 74. In order to determine the Petitioner's pro rata share, however, MHT would have to know the total number of outstanding bonds. This is probably impossible because there is no way for MHT to determine whether the Cuban government has redeemed any outstanding bonds remitted by Cuban nationals.

III. NO IMPORTANT FEDERAL QUESTION IS PRESENTED WARRANTING THIS COURT'S ATTENTION

The issues Petitioner seeks to have this Court address necessarily rest on the interpretation of one specific contract, the Agreement between Cuba and MHT. The interpretation of this contract has little bearing outside the scope of this case, and it does not present an issue of sufficient public importance to merit this Court's consideration. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) (certiorari should not be granted merely for benefit of particular litigants).

IV. THE PETITION IS UNTIMELY

Pursuant to an extension of time granted by this Court, the deadline for Petitioner to file her petition was January 18, 1990. Although a petition was served on January 17, 1990, it did not comply with the printing requirements of Supreme Court Rule 33. That rule provides that a document not meeting these requirements shall not be accepted for filing, but the filing "shall not thereby be deemed untimely *provided that new and proper copies are promptly substituted*." Sup. Ct. R. 33.7 (emphasis added). The subject petition was not resubmitted in proper form until July 2, 1990, almost half a year after the January 18, 1990, deadline. Petitioner thus failed to promptly substitute the defective petition with one in compliance with this Court's rules, and this petition should be denied as untimely.

CONCLUSION

The petition for writ of certiorari should be denied because the petition is untimely, the underlying decision was proper and does not conflict with decisions of other circuits, and because no important federal question is presented worthy of this Court's review.

Respectfully submitted,

JULIAN H. KREEGER
KREEGER & KREEGER
44 West Flager Street
Miami, Florida 33130
Telephone (305) 373-3101

CHRISTIAN D. KEEDY, P.A.
Counsel of Record, and
TIMOTHY H. CRUTCHFIELD
KELLEY DRYE & WARREN
Attorneys for Manufacturers Hanover Trust Company
2400 Miami Center
201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 372-2400